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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1644

LLOYD F. and ELOISE L. CANFIELD,

Petitioners,

v.

THE CITY OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No.

LLOYD F. and ELOISE L. CANFIELD,

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v.

THE CITY OF NEW YORK,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, Lloyd F. and Eloise L. Canfield, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on September 27, 1979, in Docket No. 78-7199.

Opinions, Judgments and Orders Below

The opinion of the United States District Court for the Southern District of New York, which awarded judgment in favor of petitioners and others similarly situated, is reported at 450 F. Supp. 846 and appears in Appendix A.[1] The judgment of the District Court appears in Appendix B. The opinion of the Court of Appeals, which reversed the

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[1] References are to the appendices submitted herewith under separate cover.

judgment of the District Court, is reported at 606 F.2d 358 and appears in Appendix C. The judgment of the Court of Appeals appears in Appendix D. The orders of the Court of Appeals, which denied rehearing and rehearing *in banc*, appear in Appendix E.

Jurisdiction

The judgment of the Court of Appeals was entered on September 27, 1979, in Docket No. 78-7199. A timely petition for rehearing containing a suggestion for rehearing *in banc* was denied on January 23, 1980, and this petition for certiorari is being filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether a Supreme Court equitable apportionment decree, or an interstate compact approved by Congress, which authorizes a municipality to make massive daily diversions of interstate river water, abrogates the municipality's obligation under the Fifth and Fourteenth Amendments to pay just compensation to private riparian landowners who were not parties to the decree or compact:

   (a) for riparian property damages caused by the municipality's diversions; and

   (b) for damages resulting from the municipality's pollution and ruination of the undiverted portions of the water.

2. Whether the Second Circuit correctly interpreted this Court's equitable apportionment decree, entered in *New Jersey* v. *New York*, 347 U.S. 995 (1954), as abrogating the

constitutional obligation of the respondent, The City of New York, to pay just compensation for tortious injuries that the City's waterworks on the Delaware River caused to thousands of riparian landowners who were not parties to the decree.

3. Whether there is a conflict between (a) this Court's decision in *North Dakota* v. *Minnesota*, 263 U.S. 365 (1923), which held that, in a Supreme Court proceeding to determine rights to use of interstate river water, a state acting *parens patriae* cannot represent individual damage claims of its private riparian landowners who are not parties to the proceeding, and (b) the Second Circuit's decision which holds that, in a Supreme Court proceeding to determine rights to use of interstate river water, a state acting *parens patriae* does represent individual damage claims of its private riparian landowners who are not parties to the proceeding.

Constitutional, Statutory and Regulatory Provisions Involved[2]

(a) The United States Constitution provisions involved are U.S. CONST. amend. V and amend. XIV, § 1, providing for just compensation and due process.

(b) The federal statute involved is the Delaware River Basin Compact, Pub. L. No. 87-328, 75 Stat. 688 (1961), which, in pertinent part, (i) preserves riparian rights along the Delaware River (Section 14.19), and (ii) waives the right of the signatory states to apply for modification of this Court's equitable apportionment decree, entered June 7, 1954, in *New Jersey* v. *New York*, 347 U.S. 995 (Sections 1.6(a) and 3.4).

[2] The pertinent texts of the constitutional, statutory and regulatory provisions involved herein appear in Appendix F.

(c) The state constitutional, statutory and regulatory provisions involved are:

(1) Pa. Const. art. 1, § 10, providing that just compensation be made or secured before private property is taken for or applied to public use.

(2) 1 Smith, *Laws Pa.* (1778) at 481, and Report of Secretary of Land Office as contained in 5 Smith, *Laws Pa.* (1812) (i), at xxvii-xxix, which "ratified" private property rights that had vested in individual landowners before the Revolutionary War.

(3) N.Y.C. Admin. Code, Ch. 51, Title K, §§ K51-26.0, K 51-44.0, providing, *inter alia,* that New York City shall pay compensation to individuals whose riparian properties on the New York State side of the Delaware River have been damaged as a result of condemnation or permanent trespass by the City.

(4) N.Y. Env. Conserv. L. § 15-0801, setting forth the New York State legislature's findings, in 1976, that New York City's impoundment and release operations on the Delaware River "have damaged the recreational uses" of the River.

Statement of the Case

a) Bases for Federal Jurisdiction

Petitioners, citizens of Pennsylvania, commenced this action against respondent, The City of New York ("City"), pursuant to 28 U.S.C. § 1331(a) (federal question) and 28 U.S.C. § 1332(a)(1) (diversity of citizenship).

b) Background

This case emanates from this Court's equitable apportionment decree ("Decree") empowering the City to take

huge amounts of water from the Delaware River, which originates in New York State and forms a boundary of the States of New York, Pennsylvania, New Jersey and Delaware ("Basin States"). *New Jersey* v. *New York,* 347 U.S. 995 (1954).[3] The Decree conditioned the City's authority on its construction of three impounding reservoirs at the headwaters of the Delaware River and on its compliance with certain provisions relating to stream management. Significantly, the Decree did not address the right of thousands of private riparian landowners along the Delaware to claim compensation for property damages that would be caused by the City's impoundment and withdrawals of River water.[4]

In 1961, the Basin States entered into a compact ("Compact") whereby they, in essence, waived their right to apply for modification of the Decree and agreed to preserve the riparian rights of private landowners along the Delaware. The Compact provides, in pertinent part:

> "Nothing contained in this compact shall be construed as affecting or intending to affect or in any way to interfere with the law of the respective signatory parties relating to riparian rights." Compact § 14.19 (Appendix F at 3f)

The legislative history of the Compact shows that the provision preserving riparian rights was added to the Compact:

> "to assuage the fears of those who may think that the compact will change private water rights." (Appendix H at 1h)

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[3] The Decree amended and superseded a decree of this Court entered May 25, 1931, 283 U.S. 805 (1931).

[4] A map showing the Delaware River, the City's three reservoirs, and the locations of a few of the thousands of riparian parcels damaged by the City's waterworks, appears in Appendix G.

After the Basin States signed the Compact, it was approved by Congress. Delaware River Basin Compact, Pub. L. No. 87-328, 75 Stat. 688 (1961).

In May 1967, the City completed construction of its third reservoir and commenced full operation of its Delaware water system. 450 F. Supp. at 850; Appendix A at 5a.

c) Nature of This Action

Petitioners brought this action in 1971. Their complaint charged that the City's massive daily diversions of Delaware River water and its mismanagement of impounding reservoirs and dams have caused the River to become polluted and otherwise ruined as a recreational site. As a result, thousands of riparian properties along the Delaware have been irreparably damaged, including petitioners' property on the Pennsylvania side of the River.[5]

The City admits that its operations on the Delaware have drastically altered the natural volume of flow, velocity, temperature and quality of the River, and acknowledges that it has already paid millions of dollars in damages to owners of property situated on the New York State side of the River (Appendix I). However, the City has refused to compensate riparians outside New York State for the same loss. The City argues that it is exempt from paying damages to out-of-state landowners because its waterworks were authorized by this Court's Decree, to which the Basin States were parties.

[5] Class action status was denied in this case after the decision in *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973), that each member of a spurious class, whether a named or an unnamed plaintiff, must satisfy the jurisdictional amount for suits in federal courts. Numerous individual actions by Delaware River riparian landowners against the City are presently pending in New York state and federal courts.

d) The Decisions Below

The District Court made the following factual findings: Since May 1967, when the City commenced full operation of its Delaware reservoirs, it has been impounding and diverting to its water supply nearly one-half the water that would otherwise flow naturally past riparian properties along the River. The City also has impaired the undiverted portions of the River by releasing only minimal amounts of water for extended periods and intermittently releasing huge quantities of unseasonably cold water through its improperly constructed dams. 450 F. Supp. at 856-858; Appendix A at 29a-42a. These massive diversions and incessant manipulations of the undiverted water have permanently damaged the River's ecology and recreational uses. In particular, there has been a growth of slime and algae along the River and an increase in mosquitoes and insects on riparian properties. The warm water fisheries of the Delaware have been almost totally destroyed and efforts to turn the River into a cold water fishery have failed. Recreational activities such as swimming and boating also have been adversely affected. 450 F. Supp. at 870-871; Appendix A at 97a-103a.

The District Court held that petitioners and other riparian landowners similarly situated have a vested property right in the natural, unabated flow of the entire Delaware River, both for commercial and recreational purposes. The Decree was entered to resolve a dispute among the Basin States over the River's water and the Decree did not, and indeed could not, abrogate the right of nonparty individual riparian landowners to receive compensation for damages caused by the City's diversions. The District Court further held that even if it were to accept, "for the sake of argument", the City's contention that it may not be required to pay riparian property owners for *water*

actually taken pursuant to the Decree, the City nevertheless must compensate the landowners for property damages resulting from its pollution and ruination of the *remaining water.* 450 F. Supp. at 867; Appendix A at 81a-82a.

The Court of Appeals reversed on the law. It held that the Decree adjudicated the rights of individual landowners together with those of the Basin States acting *parens patriae;* and that the Supreme Court's equitable apportionment of the Delaware *ipso facto* bars individual riparians from asserting damage claims against the City, either for water actually taken or for impairment of the remaining water. The Second Circuit concluded that compensation payments to private riparian landowners would negate the Decree and would be inconsistent with the Decree's "supremacy"; and that the Compact is a further bar to individual damage claims since the Basin States thereby agreed not to seek modification of the City's authority under the Decree.

Significantly, the decision of the Court of Appeals is the first to deny riparians the right to sue an out-of-state municipal diverter for damaging their property.

Reasons for Granting the Writ

The Second Circuit decision violates the constitutional precept that just compensation must be paid for private property taken for public use, and denies thousands of landowners outside New York the same protections afforded New York landowners. If the decision is permitted to stand, equitable apportionment decrees and interstate compacts will be viewed by diverters as authority to expropriate private property without payment of just compensation, and as a license to pollute and otherwise ruin undiverted interstate water without just compensation.

The Second Circuit decision, that individual damage claims were adjudicated by the Basin States acting *parens patriae,* expands the *parens patriae* doctrine well beyond the limits which this Court has imposed on that doctrine.

This Court has not explicitly ruled on the right of riparian owners to claim compensation for property damages caused by diversions authorized by equitable apportionment decrees. However, the Second Circuit's rejection of such claims conflicts with Supreme Court decisions that (a) vested riparian property rights may not be destroyed or impaired, even for the public good, without just compensation, *Yates* v. *Milwaukee,* 10 Wall. (77 U.S.) 497 (1871); (b) vested property rights are not subject to later defeasance by operation of any doctrine of federal common law, *Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.,* 429 U.S. 363, 371-372 (1977); and (c) both the *parens patriae* doctrine and the Eleventh Amendment bar a state from representing individual riparians' damage claims, *North Dakota* v. *Minnesota,* 263 U.S. 365, 374-376 (1923). In addition, the Court of Appeals decision renders nugatory the Compact provision which expressly preserves riparian rights along the Delaware and the decision therefore is in conflict with the Court's determination in *Nebraska* v. *Iowa,* 406 U.S. 117 (1972).

I.

The Second Circuit Decision Permits the Unconstitutional Destruction of Private Property Without Just Compensation.

(a) The United States Constitution Mandates That the City Compensate Delaware Riparians

As shown in point I(b) below, private landowners along the Delaware have vested property rights in the natural flow of the entire River. Their riparian property rights

may not be destroyed or impaired, even for the public good, without just compensation. *See, e.g., Yates* v. *Milwaukee,* 10 Wall. (77 U.S.) 497 (1871), wherein this Court held that:

> "This riparian right is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and *if necessary that it be taken for the public good, upon due compensation.*" 10 Wall. (77 U.S.) at 504. (Emphasis supplied)

The vitality of the holding in *Yates* was most recently reaffirmed by the Court in *Bonelli Cattle Co.* v. *Arizona,* 414 U.S. 313, 326 (1973).[6]

Neither the courts nor the legislature may circumvent Fifth and Fourteenth Amendment prohibitions against confiscation or impairment of property without just compensation and without due process by making laws which retroactively convert vested private property into public property. *See, e.g., Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.,* 429 U.S. 363, 371-372 (1977); *Bonelli Cattle Co.* v. *Arizona,* 414 U.S. 313, 331 (1973), citing and quoting with approval the concurring opinion of Mr. Justice Stewart in *Hughes* v. *Washington,* 389 U.S. 290, 298 (1967).

Yet, such an unconstitutional result follows from the Second Circuit's erroneous conclusion that the device of equitable apportionment permits the destruction of individual riparian property without just compensation. As the District Court observed, even assuming, *arguendo,* that the City may not be required to pay riparians on the Delaware for *water actually taken* pursuant to the Decree, the City surely must compensate the landowners for property damages resulting from the City's pollution and ruination of the *remaining water.* 450 F. Supp. at 867; Appendix A at 81a-82a; *see, e.g., Henry Ford & Son, Inc.* v. *Little Falls Fibre Co.,* 280 U.S. 369 (1929).

[6] On entirely different grounds, *Bonelli* was overruled by *Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.,* 429 U.S. 363 (1977).

The Court of Appeals decision also erroneously imputes to the Supreme Court the intention to violate the equal protection provisions of the United States Constitution by discriminating in favor of property owners in New York and against property owners in the other Basin States. In denying recovery to petitioners, the Court of Appeals reasoned that since their State, Pennsylvania, argued in favor of equitable apportionment in the Supreme Court proceedings, petitioners and other Pennsylvania riparians lost their rights in the natural flow of the Delaware as well as their right to sue the City for impairment of the undiverted water. The fallacy of this reasoning becomes readily apparent when one considers that New York also argued in favor of equitable apportionment. Yet New York riparians situated directly across the river from Pennsylvania riparians retained the property rights in the natural flow of the Delaware and have already been compensated by the City for damages caused by its reduction, manipulation and worsening of the flow. See cases cited at 450 F. Supp. at 868-869; Appendix A at 88a-92a.

It is manifest that the Supreme Court could not have intended that this result follow from its Decree. Nor could the Basin States have intended that such a result follow from their signing the Compact. Indeed, the Compact expressly preserves riparian rights along the Delaware, and

the legislative history of the Compact shows that the provision preserving riparian rights was added to the Compact:

> "to assuage the fears of those who may think that the compact will change private water rights." (Appendix H at 1h)

Since the Compact expressly preserves private water rights, and since it was signed before the City began full operation of its Delaware water system, the Court of Appeals erred in holding that by signing the Compact the Basin States ceded the right of individual riparians to sue the City for damages resulting from its impairment of the *undiverted* water. *See, Nebraska* v. *Iowa,* 406 U.S. 117 (1972).

(b) Riparians in the Basin States Have Vested Property Rights in the Natural Flow of the Delaware. An Equitable Apportionment Decree Cannot Defeat These Rights.

An historical review of riparian property rights shows that the Court of Appeals erred when it determined that individual landowners' rights in the natural flow of the Delaware were derived from State grants; were limited by State boundaries; and were circumscribed by this Court's federal common law which the Court applied to apportion the Delaware.

Riparian rights in the Basin States, as in other eastern states, were derived from the Crown and vested in individual landowners during the colonial period.[7] Before the

[7] An historical review of riparian property rights (*Coffee* v. *Groover,* 123 U.S. 1, 11 (1887)) shows that English common law prevailed in the thirteen colonies before the Revolution. *See, e.g., Kansas* v. *Colorado,* 206 U.S. 46, 94 (1907); *Shively* v. *Bowlby,* 152 U.S. 1, 14 (1894); *Naglee* v. *Ingersoll,* 7 Pa. 185, 201-202 (1847):

(footnote continued on following page)

Revolution, every riparian along a river, including the Delaware, possessed the same right in the natural, unabated flow of the entire river, *unaffected by territorial boundaries.* The distinct property right in the corpus of the water belonged to the Crown and its proprietaries.[8] After the Revolutionary War, the Crown and its proprietaries ceded their right in the corpus of the water to the original states.[9] The distinct property right in the natural flow that had previously vested in private landowners remained with them, according to principles of international law:

(footnote continued from preceding page)

Storer v. *Freeman,* 6 Mass. Rep. 435, 438 (1810); Gould, *On Waters* § 32 (2d Ed.). By contrast, in western states, property rights originated with or were dependent upon grants from federal or state authorities. *See, e.g., California* v. *United States,* 438 U.S. 645 (1978); *Bonelli Cattle Co.* v. *Arizona,* 414 U.S. 313, 317-318 (1973). Thus, in western states (unlike the thirteen colonial states) the rights of riparians may be no greater than the rights granted to them by their respective states. Hence, to the extent that the Court of Appeals relied upon decisions involving property rights in western states [such as *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.,* 304 U.S. 92 (1938), and *Wyoming* v. *Colorado,* 286 U.S. 494 (1932)], the court was clearly in error.

[8] *See, e.g., Hughes* v. *Washington,* 389 U.S. 290, 293 (1967); *United States* v. *Rio Grande Dam and Irrigation Co.,* 174 U.S. 690, 702 (1899); *Rundle* v. *Delaware and Raritan Canal Co.,* 21 Fed.Cas. 6, 13 (No. 12,139) (C.C.E.D. Pa. 1849), *aff'd,* 14 How. (55 U.S.) 80 (1852); *Tyler* v. *Wilkinson,* 24 Fed. Cas. 472, 474 (No. 14,312) (D.C.R.I. 1827); Black's Pomeroy, *On Water Rights* §§ 8, 9 (1893); Gould, *Law of Waters* § 204 (1891); Lewis, *On Eminent Domain* §§ 61, 62 (1888); G. B. French and J. Smith, *Power to Divert An Interstate River,* 8 Harv. L. Rev. 138, 148-149 (1894); 3 J. Kent, *Commentaries On American Law* 439 (3d Ed.); J. W. Pomeroy, *An Introduction to the Constitution of the United States* § 47 (1880). The individual landowner's riparian right to the natural flow was subject to navigational servitude held by the Crown for the benefit of the public. Now the navigational servitude is embodied in the Commerce Clause of the United States Constitution.

[9] *See, e.g., Bonelli Cattle Co.* v. *Arizona,* 414 U.S. 313, 317-318 (1973); *Shively* v. *Bowlby,* 152 U.S. 1, 14 (1894); *Rundle* v. *Delaware and Raritan Canal Co., supra* note 8; Gould, *On Waters,* § 32 (2d Ed.).

> "[A]s a general principle of international law, . . . cession of territory only operates upon the sovereignty and jurisdiction, including the right to the public domain, and *not upon the private property of individuals which had been segregated from the public domain before the cession.* . . . The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property, remain undisturbed." *Coffee* v. *Groover*, 123 U.S. 1, 9-10 (1887). (Emphasis supplied)[10]

Since the Revolution, federal and state courts in the eastern states have preserved and protected individual common law riparian property rights that vested during the colonial period.[11] Courts protect such rights, *without regard to state boundaries*, by awarding damages in favor of riparians and against municipalities in neighboring states which divert water to supply their inhabitants.[12]

In *Pine* v. *City of New York*, 112 Fed. 98 (2d Cir. 1901), *injunction rev'd for award of damages*, 185 U.S. 93 (1902),

[10] In 1779, Pennsylvania passed statutes which "ratified" private property rights that had vested in individual landowners before the Revolution. See 1 Smith, *Laws Pa.* (1778) at 481; Report of Secretary of Land Office as contained in 5 Smith, *Laws Pa.* (1812) (i), at xxvii-xxix. (Appendix F at 3f-9f). Of course, even without such statutory provision the transfer of territory by the Crown would not affect vested private property rights. *See, e.g., Knight* v. *U.S. Land Association*, 142 U.S. 161, 183-184 (1891).

[11] *See, e.g., York Haven Water & Power Co.* v. *York Haven Paper Co.*, 201 Fed. 270, 275-276 (3d Cir. 1912); *Citizens' Electric Co.* v. *Susquehanna Boom Co.*, 270 Pa. 517 (1921); 39 Pennsylvania Law Encyclopedia, *Waters* § 219 (1961); *Matter of Van Etten* v. *City of New York*, 226 N.Y. 483 (1919); *Strobel* v. *Kerr Salt* Co., 164 N.Y. 303 (1900).

[12] *See, e.g., Banigan* v. *City of Worcester*, 30 Fed. 392 (C.C. Mass. 1887); *Manville Co.* v. *City of Worcester*, 138 Mass. 89 (1884); *see also, Rundle* v. *Delaware and Raritan Canal Co.*, 21 Fed. Cas. 6 (No. 12,139) (C.C.E.D. Pa. 1849), *aff'd*, 14 How. (55 U.S.) 80 (1852).

the Second Circuit correctly applied the water laws prevailing in the eastern states since colonial times, and held that riparian rights are not affected by state boundaries. In fact, the Second Circuit in *Pine* sought to protect out-of-state landowners by issuing an *injunction* against the City's diversions and manipulations within New York State. The Supreme Court vacated the injunction on the condition that the City pay *damages* to the out-of-state riparians.[13]

Thus, when the equitable apportionment proceedings underlying the Decree began, the Basin States jointly held the right in the corpus of the Delaware's water whereas riparians owned the right to the natural, unabated flow of the *entire* Delaware, regardless of where their property was situated. In those proceedings, the Supreme Court applied the federal common law that it had created, to determine New York's share of the corpus of the waters that it held jointly with the other Basin States. But federal common law could not divest individual landowners from their separate vested property rights in the natural flow of the Delaware. As the Court recently stated:

[13] Perhaps the Court of Appeals in this case declined to follow its own decision in *Pine* v. *City of New York* because of its concern that the City might incur "costly disbursements" and "unreasonable damage burdens." 606 F.2d at 366, 367, 369. [Following the decision, the City reported that it could have been involved in claims by "10,000 New Jersey and Pennsylvania property owners" which "could have cost the City $15 million" (N.Y. Times, 9/30/79, Col. 1, p. 36; Appendix J).]

However, in expressing its concern, the Court of Appeals overlooked the fact that *the City sells the water that it diverts from riparians on the Delaware and thereby derives substantial revenues. See, e.g., Oakes Manufacturing Co.* v. *City of New York*, 206 N.Y. 221, 228 (1912) [See Appendix K for City's revenues from water charges, and Appendix L for Special Master's findings on City's profits, *New Jersey* v. *New York*, 283 U.S. 336 (1931).] Moreover, *Pine* v. *City of New York* shows that the City's costs are not relevant to a determination of its liability. 103 Fed. at 338; 185 U.S. at 95.

> "[Vested property rights are] not subject to later defeasance by operation of any doctrine of federal common law." *Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363, 371-372 (1977).

Clearly, the Court's statement of the rule refutes the Court of Appeals' conclusion that compensation payments to riparian landowners would be inconsistent with the "supremacy" of a Supreme Court equitable apportionment decree. 606 F.2d at 366; Appendix C at 16c.

To summarize, equitable apportionment decrees and interstate compacts should be held to affect private riparian owners to the same extent as, but no more than, any other taking by eminent domain—*viz.*, although riparians may not enjoin diversions authorized by decrees or compacts, the landowners must be justly compensated by the diverters for the resultant damages to their riparian properties. Such holding would afford riparian owners the protections guaranteed them by the Constitution and would harmonize the doctrines of equitable apportionment and riparian rights. The Second Circuit's contrary holding denies constitutional protections and nullifies this Court's decisions that riparians' right to the natural, unabated flow of the water is property which may not be destroyed or impaired without just compensation, and that federal common law cannot be employed to defeat vested property rights.

II.

By Acting *Parens Patriae* the Basin States Did Not and Could Not Cede Individual Damage Claims.

The Court of Appeals misapprehended the *parens patriae* doctrine when it expressed the opinion that in the proceedings underlying the Decree Pennsylvania represented individual riparian damage claimants and bartered their claims for interests of its other citizens.

It is well-established that when a state brings an action as *parens patriae* it acts solely for the general welfare of all of its citizens, representing interests that are separate and distinct from those of its individual citizens. For a state to represent individual damage claimants in such proceedings would violate not only the *parens patriae* doctrine but also the Eleventh Amendment prohibition against suits by citizens of one state against another state.[14] Furthermore, when acting *parens patriae,* a state cannot assert rights in favor of one group of its citizens against another.[15]

The decision in *North Dakota* v. *Minnesota,* 263 U.S. 365 (1923), is directly in point. There, Minnesota accelerated the speed of flow and increased the volume of water of a river in Minnesota so that when the river reached North Dakota it overflowed and damaged valuable riparian farm properties situated there. The Supreme Court permitted North Dakota to invoke the Court's original jurisdiction to obtain *injunctive relief* for the benefit of the general welfare of its citizens. However, the Court held that North Dakota could not utilize the *parens patriae* proceeding to pursue *individual damage claims* of its riparian farmers. To per-

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[14] *Hawaii* v. *Standard Oil Company of California,* 405 U.S. 251 (1972); *North Dakota* v. *Minnesota,* 263 U.S. 365 (1923); *Georgia* v. *Tennessee Copper Co.,* 206 U.S. 230 (1907); *Maine* v. *M/V Tamano,* 357 F. Supp. 1097 (D. Maine 1973).

[15] *See, e.g., Hawaii* v. *Standard Oil Company of California, supra* at 258, n.12; *New Mexico* v. *Aamodt,* 537 F.2d 1102, 1107 (10th Cir. 1976), *cert. denied sub nom, New Mexico* v. *United States,* 429 U.S. 1121 (1977). The Court of Appeals' suggestion that Pennsylvania struck a bargain with the City and State of New York in the equitable apportionment proceedings is contrary to this Court's pronouncement that the Court is not authorized to make contracts between two states. *Kansas* v. *Colorado,* 206 U.S. 46, 100 (1907).

mit North Dakota to recover damages on behalf of its individual riparian landowners, the Court held, would also circumvent the Eleventh Amendment which prohibits suits by citizens of one state against another state.

In both *North Dakota* v. *Minnesota* and in the Supreme Court proceeding underlying issuance of the Decree, the Court determined disputes between states regarding rights to use of interstate river water. As in *North Dakota* v. *Minnesota,* here too, damage claims of individual riparians injured by drastic alterations of the volume of flow, velocity and quality of the river could not have been and were not adjudicated by the states acting *parens patriae* before the Court.[16]

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[16] The Court of Appeals' view that Pennsylvania, in effect, ceded to the City the riparian rights of individual Pennsylvanians and gave the City the license to impair the value of their properties, is also contrary to the Pennsylvania Constitution. It provides that private property may not be taken for public use "without just compensation being *first* made or secured." PA. CONST., art. 1, § 10 (Appendix F at 3f) (Emphasis supplied).

Since Pennsylvania riparians have not been compensated, the City is a trespasser and must pay damages. *See, e.g., Albert Hanson Lumber Company, Ltd.* v. *United States,* 261 U.S. 581, 587 (1923); *Bauman* v. *Ross,* 167 U.S. 548, 598-599 (1897); *Cherokee Nation* v. *Southern Kansas R. Co.,* 135 U.S. 641, 659-660 (1890); *Wagner* v. *Purity Water Co.,* 241 Pa. 328, 334 (1913); *Appeal of Shenandoah Co.,* 2 W.N.C. 46 (Pa. 1875); *Matter of Van Etten* v. *City of New York,* 226 N.Y. 483 (1919).

The City is liable for the full amount of the damages even if Pennsylvania is deemed a joint tortfeasor. *Kendrick* v. *Piper Aircraft Corp.,* 265 F.2d 482, 485 (3d Cir. 1959); *McKenna* v. *Austin,* 134 F.2d 659, 664 (D.C. Cir. 1943); *Ross* v. *Licht,* 263 F. Supp. 395, 411 (S.D.N.Y. 1967); Restatement, *Torts* §§ 875, 876 (1939); Prosser, *Torts* at 314 (4th Ed. 1971).

See also, Rundle v. *Delaware and Raritan Canal Co.,* 21 Fed. Cas. 6 (No. 12,139) (C.C.E.D. Pa. 1849), *aff'd,* 14 How. (55 U.S.) 80 (1852), which holds that Pennsylvania riparians' right to recover damages from an out-of-state diverter is governed by Pennsylvania law.

In fact, Supreme Court records relating to equitable apportionment proceedings show that state-diverters acknowledged liability for damages to individual riparians.

Thus, the record in *New Jersey* v. *New York,* 283 U.S. 336 (1931), shows that New York:

> "expressed the ability and willingness of the City of New York to pay damages to anyone injured in New Jersey, . . ." Record, Index No. 64 at 23 (Appendix L at 1L)

Similarly, the record in *Connecticut* v. *Massachusetts,* 282 U.S. 660 (1931) (the only other equitable apportionment case involving colonial riparian rights states) demonstrates that Massachusetts conceded its liability to pay damages to Connecticut riparian landowners. In its pleadings, Massachusetts submitted that:

> "[B]y the common law of the Commonwealth of Massachusetts . . . a remedy is given not only to citizens of the Commonwealth of Massachusetts but to citizens of the State of Connecticut for damages suffered within their borders by virtue of any diversion authorized by the said Commonwealth." Record, Index No. 15 at 27-28 (Appendix L at 3L)

Hinderlider v. *La Plata River & Cherry Creek Ditch Co.,* 304 U.S. 92 (1938), which the Court of Appeals found to be controlling, was not a damage action by riparian landowners. It was an injunction action by an *appropriator* of water, to halt upstream diversions authorized by an interstate compact. The plaintiff appropriator in that case did not seek damages, and nowhere in the decision did this Court state that riparians did not have an individual right to sue. Yet the Court of Appeals read the Supreme Court's holding in *Hinderlider* as barring damage claims by Dela-

ware River riparians against the City. In addition, the Court of Appeals overlooked the record in *Hinderlider* in which the trial court stated that individual riparians *had* a right to sue for damages:

> "Plaintiff's counsel seems to concede that this is not an action for damages, but is for injunction; and that no . . . judgment for damages can be rendered. As this action is brought by the corporation only, while the principal damages (if damages should be recoverable) accrue to the individual farmers, separately, that concession of plaintiff's counsel seems to be right." Record, Index No. 437 at 53 (Appendix L at 3L-4L).

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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